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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHAIM BABAD, BERNARD STEINMETZ and EMANUEL STEINMETZ, a Co-Partnership d/b/a J.R.R. REALTY CO.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

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INTRODUCTION

This Memorandum is submitted in reply to the Brief in opposition filed by the National Labor Relations Board ("Board" or "NLRB") in this matter.[1/] It is filed in support of the Petition for certiorari.

ARGUMENT

The relevant facts are outlined in the Petition for Certiorari.

1/ Petitioner does not respond to the "Intervenor's" brief. Firstly, it is unclear whether an intervenor below may participate in the instant proceeding. Secondly, its detailed "merits" brief does not address the appropriateness of a grant of Certiorari. Indeed it reflects that important issues exist to be considered by the Court rather than militating against Court consideration of the issues. Finally, the positions taken are clearly at odds with the Court of Appeals' decision and the Board's brief in opposition to the Petition for Certiorari as they relate to what was and was not decided by the New York Courts.

The relevant decisions of the New York Courts are reproduced in Footnotes 2 and 3 of the Board's Brief in Opposition.[2/] The Court decisions clearly state that the collective bargaining agreements were not assumed by Petitioner. The Board found that they were assumed on the same evidence. The Board did not refer to, let alone distinguish, the Court decisions. The Court of Appeals, not the Board, dealt with the Court decisions. Hence, contrary to the Board's Brief in Opposition, the "Chenery" doctrine is clearly impli-

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2/ The full text of the Appellate Division decision is at 446 N.Y.S. 2d 193. It is noted that the Board's brief in opposition does not reflect the Court's full decision. Hence, the Court's finding that the "...contract of sale did not compel J.R.R. to adopt the collective bargaining agreement..." is given no play in the Board's brief.

cated. An administrative agency should not be permitted to play cat and mouse with a Court judgment and expect to be sustained in doing so. The agency must meet the issue and, with appropriate rationale, determine it. Accordingly, the Board should have stated why it believes the Court judgments are not binding upon it. The Court of Appeals had no Board rationale before it and it supplied the Board a rationale.[3/] This was a clear violation of the Chenery doctrine and the Court should grant Certiorari to reinforce this important doctrine. ("What we may not do, however, is to presume that the Board made findings of fact necessary to a

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3/ In this regard the Board's brief in opposition (Pg. 5) inaccurately asserts that the Board was upheld by the Court of Appeals.

defensible decision. cf Sec v. Chenery Corp., 318 US 80 (1943)"; IBEW Local 1395 v. N.L.R.B., ____ F2d ____, 122 LRRM 3265 at 3272 (CA D.C. 8/8/86) emphasis in original.

More importantly, the issues raised in the Petition are clearly important for this Court to review. Even the Board's brief in opposition, at Footnote 6, recognizes that there is a split in the Circuit Courts of Appeals on the issue of what collateral estoppel effect prior Court decisions should have on the Board. Accordingly, Supreme Court guidance is necessary to resolve this recurrent problem of dual jurisdictions in enforcement of labor contracts. Indeed, the Board itself has acknowledged that "The Courts have given uncertain guidance..." on the issue and has left "...for another day..." its own determi-

nation of whether it considers itself bound by a prior Court judgment regarding a contract. Allbritton Communications Co., 271 NLRB 201, 202 N4 (1984).[4] It is difficult to imagine why the Board would not regard this issue as important for this Court to review,[5] since it, itself, has not

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4/ The D.C. Circuit has recently pointed out that there is a Circuit conflict regarding what deference a reviewing Circuit Court should give Board findings on contract matters, even where there is no conflicting Court judgment. It has now held that Board findings on contract interpretation matters is "...entitled to 'no particular deference' 510 F2d at 805." IBEW Local 1395 v. NLRB, supra, at 3268. The Court stressed that the Board cannot be permitted to apply different standards of contract interpretation than Courts.

5/ The Board's brief in opposition (Footnote 5) thus incorrectly states that no issue of the binding effect of Court judgments is presented here. Moreover, the Court of Appeals implicitly held that the Board is precluded from relitigating a Court judgment.

reached a conclusion on the issue.

As noted in the original Petition for Certiorari, Petitioner asserts that res judicata, rather than collateral estoppel, applies herein because the Board is in privity with the charging party union. Hence, the "essential to the judgment" test would be inapplicable to a res judicata argument. (See Petition for Certiorari at 48.) The determination of this aspect of the proceeding also requires Supreme Court review of this recurrent problem. Indeed the Ninth Circuit in the Heyman case regarded res judicata as the appropriately applied standard. The Second Circuit regarded collateral estoppel as the standard. 28 USC Sec. 1738 requires review of the State Court doctrine of res judicata. If res judicata applies, there is no "essential

to the judgment" test.[6/] Thus the Board is incorrect in asserting that the case "...involves only the proper characteri-

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6/ When one reviews the Court judgment, Board brief in opposition at Fn. 2, it is difficult, if not impossible, to understand how the Court of Appeals could hold that the State Court "...did not decide..." the contract assumption issue. Moreover, while this Court has, under certain circumstances, held that a successor employer can be bound to arbitrate John Wiley v. Livingston 376 US 543 (1964) it has never held a successor bound to a predecessor labor contract Burns v. N.L.R.B, 406 US 272. The Court of Appeals found that Petitioner was not bound to arbitrate but was bound to the contract. This stands successorship law on its head. Furthermore, if collateral estoppel is applied, it was essential to the judgment finding that the agreement to arbitrate was not assumed, that the agreement containing the arbitration clause was not assumed. After all, if the agreement was assumed, as the Court of Appeals holds, the agreement to arbitrate disputes contained therein is also assumed. It is one part of a larger contract assumption. The Board's reliance on Allbritton Communications v. N.L.R.B., 766 F2d 812 is clearly misplaced. There, a judge's "merits" finding was not essential to a case that was remanded to the State Court, since the Federal Court had no jurisdiction to make those findings.

zation of the opinions of the New York State Courts..." Rather what is implicated is Federal law, i.e., 28 USC Sec. 1738, and the proper test for application of that Federal statute. (See, e.g., University of Tennessee v. Elliot, 46 S.Ct. Bull. 4170)

The Board is incorrect in asserting that the Appellate Division deferred to the Board's resolution on contract assumption. The Appellate Division did not issue a stay of arbitration pending NLRB determination regarding Petitioner. It did so only regarding the Seller, J.A.R. As to Petitioner, it did not, at all, modify the lower Court's judgment of a permanent stay of arbitration, since the contract was not assumed. The Court did not defer to the NLRB on that issue. At best, it could be argued that the Court recognized that the NLRB could

find, based on other evidence of conduct of Petitioner, that the successor was bound to the predecessor's contract, or liable for back pay, thus making arbitration against the seller redundent. The basis for such a finding, however, would not rest on the very documents that the lower and appellate courts had before them. Those documents simply did not reflect an assumption, and the Court so found. Obviously had the Court considered that the entire case was to be determined by the NLRB, as the Board's brief contends, it would have modified the permanent stay as to both Petitioner and the seller. Its order reflects that it had determined Petitioner's duties and had found no assumption and that there was a modification only as to the sellers that was to await NLRB disposition. Yet the

NLRB, on the same evidence that was before the Court, found that the contract, and for that matter, ipso facto, its arbitration clause, was assumed.

Similarly, the Board is incorrect, as was the Court of Appeals, that the only substantive matter resolved was the "...application of the arbitration clause to petitioner." Any objective reading of the decisions reflects that the predecessor's labor contract as a whole was not assumed.

CONCLUSION

The issues raised herein are singularly ripe for Supreme Court review. They deal with an area of the law that is exceedingly unsettled and that require this Court's attention and review so that standards can be

established on those issues. (See "reasons for granting the writ" section of the Petition for Certiorari.)

Respectfully submitted,

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